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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 715.

H. J. BLACKFORD, *et al.*,
Petitioners,

against

LEGH R. POWELL, JR., *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Preliminary Statement.

The Respondents joining in this brief are Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the properties of Seaboard Air Line Railway Company (hereafter for brevity sometimes referred to as the "Seaboard"), Otis A. Glazebrook, Jr., Joseph France and S. Ralph Warnken, constituting the Reorganization Committee of the Seaboard, The New York Trust Company, as Trustee of Seaboard Air Line Railway Refunding Mortgage, and Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees of Seaboard Air Line Railway Company First and Consolidated Mortgage.

The Petition of Blackford, *et al.*, to review the decision of the Circuit Court of Appeals for the Fourth Circuit handed down October 11, 1945, is, as were the proceedings in the Courts below instituted by the Petitioners, clearly a belated attempt to upset and nullify the Plan of Reorganization of the Seaboard approved by the Decrees of the Seaboard Receivership Courts, affirmed on appeal by the Circuit Courts of Appeals, respectively, for the Fourth and Fifth Circuits and certiorari denied by this Court. *Badenhausen, et al.* v. *Guaranty Trust Company of New York, et al.* 146 Fed. (2d) 40; (cert. den. 323 U. S. 797); *Badenhausen* v. *Glazebrook*, 148 Fed. (2d) 450; (cert. den. October 8, 1945—No. 213). The Adjustment Bonds held by the Petitioners here, which are the subject of the Petition, were dealt with and denied participation in the Seaboard Plan by the District Court for the Eastern District of Virginia in its full opinion stating its reasons for approving the Plan. *Guaranty Trust Company of New York* v. *Seaboard Air Line Railway Company*, 53 Fed. Supp. 672.

The Petition is so wholly lacking in substance that a reply should not be necessary. However, since the Seaboard Reorganization is on the very verge of complete consummation and the granting of the Petition would result in substantial delay in such consummation, counsel feel it incumbent upon them to point out now in some detail the reasons why the Petition should be denied.

The Decree of December 10, 1943 approving the Plan was rendered only after elaborate hearings held in October and November 1943 after full notice to all parties in interest upon the Report of the Special Master appointed to recommend a Plan, who had himself conducted hearings throughout the period January 1940 to July 1943, when the Report was filed.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit sought to be reviewed by the Petition is not yet reported but appears at pages 337 to 342 of the printed record in this Court filed with the Petition of Blackford, *et als.* The Seaboard Receivership Court (Eastern District of Virginia) in dismissing by its order dated April 27, 1945 (R., p. 46) the intervening petition of Blackford and others, filed no written opinion, but delivered an oral opinion which appears in the Record at pages 126-131.

Jurisdiction.

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code (28 U. S. C., Section 247), but the Petition states none of the "special and important reasons" for certiorari given in Section 5 of Rule 38 of this Court. *United States* v. *Johnson,* 268 U. S. 220, 227 (1925).

Statement of the Case.

In affirming the order of the Court below the Circuit Court of Appeals in its opinion declared that the appeal to that Court was completely devoid of merit as shown from the following excerpts from that opinion:

> "It is obvious from the opinion of the District Court* and of this Court heretofore filed in this proceeding that the present appeal is completely devoid of merit. * * *"
>
> "The conclusive answer to the appeal, however, is the patent fact that it is an attempt to set aside

* The opinion of the District Court referred to by the Circuit Court of Appeals is the opinion in *Guaranty Trust Company of New York* v. *Seaboard Air Line Ry. Co.* cited *ante,* p. 2.

the plan of reorganization formulated after years of careful investigation and approved by the District Court and by this court on appeal. No satisfactory excuse or explanation for so extraordinary an effort has been or can be made. Appellant Blackford's bonds were acquired on December 19, 1944, after the decision of this court, and Simpson's bonds were acquired by him partly before and partly after the decree of the District Court on December 10, 1943, and none of the appellants or other holders of the bonds took any action against the plan after that decree until February 9, 1945 when the petition now under consideration was filed. The laches of the appellants has been so gross that they are entitled to no further consideration by the court. Indeed there is much ground in support of the motion of the receivers that the court should impose a penalty upon them for taking an appeal so lacking in justification, as authorized by the statutes, 28 U. S. C. A. Sections 878 and 880, which provide that where a judgment is affirmed by a Circuit Court of Appeals, the court shall adjudge to the appellees just damages for the delay, and single or double costs in its discretion."

The mortgage known as the Adjustment Mortgage, given by Seaboard Air Line Railway, predecessor to the present Seaboard Air Line Railway Company, dated October 1, 1909, to secure the bonds held by the Petitioners, is by its terms expressly subordinate to the lien of the Refunding Mortgage executed by the same company which covered the identical properties covered by the Adjustment Mortgage.

The Fidelity Trust Company, Trustee of the Adjustment Mortgage, obviously recognizing the futility of litigation, never appeared or took any part in the Seaboard Reorganization Proceedings but consistently defaulted in other prior lien mortgage foreclosure proceedings, which

matured in a Consolidated Decree of Foreclosure and Sale entered in April 1945, pursuant to which all property subject to the lien of the Adjustment Mortgage was sold on foreclosure of prior mortgages (R. pp. 294, 295, 323-328). No appeal was taken from the Final Decree of Foreclosure and Sale, or from the Order confirming the sale thereunder. That settled the rights of the Adjustment Bonds and precluded any subsequent efforts to reopen the Reorganization Proceedings. *Shaw* v. *Little Rock and Fort Smith Ry. Co.*, 100 U. S. 605; *Wallace* v. *Loomis*, 97 U. S. 146; *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475.

In approving the Seaboard Reorganization Plan by its Decree dated December 10, 1943, the Virginia District Court filed an elaborate opinion. *Guaranty Trust Company of New York* v. *Seaboard Air Line Railway Company*, 53 Fed. Supp. 672. This opinion at pages 680 and 681 of 53 Fed. Supp. gives fully the reasons for denying the Adjustment Bonds participation in the Plan. As stated on pages 14 and 15 of the Petition, an appeal was taken from this Decree by a group calling themselves "Representatives and Agents of Seaboard Air Line Railway Adjustment 5's '49 Bondholders Group" (see also R., pp. 239-241) but this appeal was withdrawn before it had been matured. This group had previously filed exceptions to the Report of the Special Master (R., p. 157) and counsel for this group were heard by the Court (R., pp. 226-235). None of these Petitioners took any appeal, and, of course, Blackford could not have done so because he did not buy his bonds until a year later.

On February 9, 1945, and therefore more than a year after the Decree of the District Court approving the Plan, these Petitioners filed their Petition, the essential purpose of which was to reopen the Decree of December 10, 1943 approving the Plan and obtain payment out of receivership funds of the Adjustment Bonds. That to do so would have

completely disrupted the Plan is too obvious to call for argument. A subordinate question raised by the Petition was as to the payment of coupons on the Adjustment Bonds that matured prior to the Seaboard Receivership, a question also disposed of by the District Court in its order dismissing the Petition and by the Circuit Court of Appeals. That aspect of the contentions of the Petitioners made in the Courts below is not renewed in the Petition or supporting brief.

Thus it is clear that the effort of the Petitioners here is to reopen and relitigate questions already decided by the previous Decree approving the Plan, from which, as to the Adjustment Bonds, no appeal was ever prosecuted.

Reasons Assigned by Petitioners in Support of their Petition.

Neither the Petition itself nor the brief in support thereof offers any intelligible reason why the previous Decree should not be treated as completely *res adjudicata* of the rights of the Petitioners, and indeed the Petition is merely an attempt to collaterally attack that Decree. All these considerations are so clearly pointed out in the opinion of the Circuit Court of Appeals that further elaboration would seem to be unnecessary.

Argument.

The sole ground suggested by Petitioners for invoking the jurisdiction of this Court is that the allocation of new securities to the First and Consolidated Mortgage Bonds, without allocating any securities to the Adjustment Bonds, was a violation of the principles laid down by this Court in *Northern Pacific Railway Co.* v. *Boyd,* 228 U. S. 422, and *Consolidated Rock Products Co.* v. *Dubois,* 312 U. S. 510.

That contention is based on Petitioners' incorrect assumption that the First and Consolidated Mortgage was junior to the Adjustment Mortgage. That is an incorrect assumption, not supported by anything whatsoever in the record.

The facts are that the Refunding Mortgage is a lien junior to various underlying liens on substantially all lines of railroad owned by the Seaboard. The Adjustment Mortgage is a lien on the same lines of railroad junior to the lien of the Refunding Mortgage. The First and Consolidated Mortgage is not a lien on any of said lines of railroad (except the East Carolina Lines referred to below) but is a first lien on certain valuable securities of subsidiaries of Seaboard and on a substantial amount of equipment. The Consolidated Mortgage is also a lien on $65,915,000 of Refunding Bonds, or 77.31% of all outstanding Refunding Bonds. Any lien of the Refunding Bonds or the Adjustment Bonds on the securities and equipment subject to the First and Consolidated Mortgage is junior to the lien of the First and Consolidated Mortgage thereon.

There was no controversy about the relative liens of the Refunding Mortgage and the First and Consolidated Mortgage except in respect of certain lines of railroad known as the East Carolina Lines. On those lines of railroad both the Refunding Mortgage and the First and Consolidated Mortage claimed a first lien. That controversy was disposed of in the Reorganization Plan on the basis of a compromise whereby a portion of the new securities representing the value of the East Carolina Lines was allocated to the Refunding Mortgage and a portion thereof was allocated to the Consolidated Mortgage. No securities were allocated to the First and Consolidated Mortgage in respect of any property on which the Refunding Mortgage or the

Adjustment Mortgage claimed a prior lien, except the East Carolina Lines.

The maximum face amount of new securities issuable under the Plan in respect of the East Carolina Lines in the Plan was $19,812,000, including approximately 56,000 shares of common stock without par value taken at $100 per share. Of those securities approximately $14,600,000 face amount were allocated to the First and Consolidated Mortgage. It is, therefore, clear that the maximum adverse effect of the settlement of the East Carolina Lines controversy on the Refunding Bonds and the Adjustment Bonds was $14,600,000.

The total claim of the Refunding Mortgage Bonds, including those outstanding in the hands of the public and those pledged under the Consolidated Mortgage, was approximately $159,000,000. The total of new securities allotted to the Refunding Bonds, both those outstanding and those pledged, was approximately $83,000,000 (taking common stock at $100 per share), leaving a deficiency of approximately $76,000,000 in the claim of the Refunding Mortgage which would have to be made good before any securities could be allotted to the Adjustment Mortgage. It is not controverted by these petitioners that the Adjustment Mortgage was in all respects junior to the lien of the Refunding Mortgage.

Since the maximum allotment to the First and Consolidated Mortgage Bonds in respect of the East Carolina Lines was only $14,600,000, it is obvious that the allotment of this additional amount to the Refunding Bonds would have fallen far short of filling out their claim and that even had all those securities been so allotted there would have been nothing available for the Adjustment Bonds.

It is, therefore, clear that there is no substance whatever to the Petitioners' claim that allotments to the First and Consolidated Mortgage were in violation of the principles of the *Boyd* case and they disregard all the facts in the record when they say (Petitioners' Brief, p. 19):

> "If there had been no compromise settlement of this question and the First and Consolidated 6% Bonds had been relegated to their proper position in the hierarchy of Seaboard securities the Adjustment Bonds *would have received full payment* before the so-called First and Consolidated 6% Bonds were permitted to participate in the allocation of the securities of the new Seaboard." (Italics supplied.)

All allotments to the Consolidated Mortgage, except the allotment of approximately $14,600,000 made in respect of the East Carolina Lines, were for property on which the First and Consolidated Mortgage had an unquestioned first lien. The allotment of securities to the Consolidated Mortgage in respect of a portion of the value of the East Carolina Lines, even if not a correct allotment, had no adverse effect on the Adjustment Bonds because the Adjustment Bonds would not have been entitled to any participation under the Plan if the entire value of the East Carolina Lines had been allotted to the Refunding Bonds.

As the Circuit Court of Appeals said (R., p. 341):

> "Nor was there any injury to holders of the Adjustment Bonds by the ratification of the compromise of the controversy which arose between the holders of the Refunding Mortgage Bonds and the holders of First and Consolidated Mortgage Bonds. The tabulations in the Special Master's report clearly show that if the compromise had not been made and litigation had resulted in a decision completely favorable to the holders of the Refunding Bonds, the additional

> payments which they would thereby have received would have still left a deficiency in their claim so that there would have been no excess payable to the holders of the Adjustment Mortgage Bonds."

As pointed out above, the question sought to be raised by this Petition is *res judicata* because of the failure of Petitioners or any other representative of the Adjustment Bonds to appeal from the order approving the Plan or from the Final Decree of Foreclosure and Sale. However, it seemed to us proper to point out to this Court that our opposition to the Petition is not primarily on technical grounds and that Petitioners could not have succeeded in their contention even if it had been timely made.

The two page argument in the brief for Petitioners (pp. 17 and 18) is largely confined to an attempt to excuse the laches of Petitioners on the sole ground that the Trustee of the Adjustment Mortgage took no action in the Seaboard Reorganization Proceedings for the protection of the bonds, but on the contrary, made repeated defaults as a party to the several proceedings for the foreclosure of mortgages prior in right to the Adjustment Mortgage.

The following language from the opinion in *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, where creditors sought belatedly to upset a railroad reorganization, is a suitable conclusion to this brief:

> "It is insisted that the circuit court erred in refusing to allow a contest of the adjudication of the rights of creditors made in its final decree, on the subsequently filed petition of these appellants; and also that it refused to allow the claim of one of these appellants who now insists that he is a creditor and entitled to share in the proceeds of the sale. In the proceedings anterior to the final decree, it appears that notice was given to all creditors to prove their

claims, and that this particular creditor had notice of those proceedings, but failed to make proof of his right. It is now insisted that the decree in respect to these several claims were merely interlocutory, and that the matter is open to further and subsequent inquiry. There is no pretense of want of notice, or ignorance of the proceedings, and no excuse given for failing to litigate all these matters when before the court prior to the decree. Under such circumstances we dissent entirely from the contention that this decree was, as to these matters, merely an interlocutory order. That decree determined the rights of all parties interested in the proceeds of this property, and if any one of these appellants after notice failed to assert his rights or to challenge the allowances then made by the court, his rights and challenge were lost. He has had his day in court, and is concluded by the final decree."

Respectfully submitted,

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